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MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5284

DOUGLAS RAYMOND DORSZYNSKI,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICI CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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BRIEF FOR AMICI CURIAE

Interest of Amici Curiae

The National Legal Aid and Defender Association (hereinafter "NLADA") is a national, private, non-profit corporation devoted to the cause of equal justice under law for all. Its membership consists of the great majority of legal services programs, public defender offices, and coordinated assigned counsel systems throughout the United States. NLADA also has approximately 3,500 individual members, many of whom are practicing attorneys who represent poor people in criminal and civil matters. Many federal public defenders are also members of NLADA and provide direct representation to criminal defendants who can be sentenced under the Federal Youth Corrections Act (hereinafter

"F.Y.C.A."). The result in this case could have great significance in determining the role of the public defenders in the F.Y.C.A. sentencing process.

The National Prison Project of the American Civil Liberties Foundation, Inc., is a non-profit, tax-exempt New York corporation, engaged in efforts, through staff attorneys and other employees, to develop rehabilitative and other programs and facilities, devise model prison procedures and regulations, and otherwise to improve prison conditions in the United States. In furtherance of the activities described above, the Project's staff attorneys and other employees are engaged in the counseling and representation of prisoners incarcerated in penal institutions under defendant's control.

ARGUMENT

The issue in this case is: Before a federal trial judge sentences a youth offender as an adult under the applicable provision of the federal criminal code, does § 5010(d) of the F.Y.C.A. require the judge to make an explicit finding, supported by reasons, that the youth offender will not derive benefit from treatment provided pursuant to the Act.[1]

Neither party to this case contends that § 5010 removes the judge's power to sentence a youth offender as an adult.

[1] The F.Y.C.A. is one of four specialized statutory schemes for the post-conviction disposition of federal offenders: juvenile offenders (those under the age of 18; 18 U.S.C. §§ 5031-37); youth offenders (those under the age of 22; 18 U.S.C. §§ 5005-26); young adult offenders (those between the age of 22 and 26; 18 U.S.C. § 4209); and adult offenders.

Section 5010 allows a judge to place a youth offender on probation (§ 5010(a)); to sentence him to a youth facility for a period less than six years (§ 5010(b)); to sentence him to a youth facility for more than six years but for not longer than the maximum applicable adult penalty (§ 5010(c)); or to sentence him as an adult. (§ 5010(d)).

or mandates that a youth offender be sentenced to an F.Y.C.A. facility. On the other hand, both parties acknowledge, as they must in the face of an explicit statutory command, that § 5010(d) limits the exercise of that power by requiring a finding "that the youth offender will not derive benefit" from treatment in an F.Y.C.A. facility before an adult sentence may be imposed. At issue in the present case, therefore, is the manner in which the judge's discretion under § 5010(d) is to be exercised, *i.e.*, the nature of the "no benefit" finding. More precisely, must the sentencing judge make that finding explicit and must he provide supporting reasons?

It bears emphasis that the issue presented is a *procedural* one: Must the "no benefit" finding be explicit and supported by reasons? Since the Court of Appeals for the Seventh Circuit held that an explicit finding of "no benefit" was not required when sentencing a youth offender as an adult and since the District Court gave no reasons, this Court does not have before it the *substantive* question of what are *sufficient* reasons under the Act for declining to sentence a youth offender to F.Y.C.A. facilities. As we show in Section III of this Brief, none of the broader questions urged on this Court for decision by respondent is properly presented.

I.

Proper Construction of the F.Y.C.A. Requires That a Sentencing Judge Make an Explicit Finding, Supported by Reasons, That a Youth Offender Will Not Derive Benefit From Treatment Provided Pursuant to the Act Before Sentencing the Youth as an Adult.

The language and history of the F.Y.C.A. demonstrate that Congress made special findings with respect to youth offenders, established special goals for sentencing them, and devised a special correctional system for their rehabilitation. The language of § 5010(d), especially when read in light of this history, compels the conclusion that an explicit finding, supported by reasons, is required before a youth offender may be sentenced as an adult.

A. *The Language of § 5010(d) Shows That an Explicit Finding, Supported by Reasons, Is Required Under the Act*

Section 5010(d) provides:

> "*If the court shall find that the youth offender will not derive benefit from treatment* under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision." (emphasis supplied)

There is a compelling inference from this language that Congress intended that an explicit conclusion of "no benefit", supported by reasons, should be articulated before sentencing a youth offender as an adult. The word "shall" indicates that the finding is mandatory. And the conclusion which a judge must reach before he may impose an adult sentence—that the youth offender *will not derive benefit* under the F.Y.C.A.—is stated in uncompromising terms, indicating, on the face of the statute, Congress' clear prefer-

ence for committing youth offenders to F.Y.C.A. facilities rather than sentencing them to adult correctional institutions.[2]

Given the importance of the § 5010(d) finding manifested on the face of the statute, a requirement that it be stated explicitly and be supported by reasons clearly follows. Such a requirement would ensure that the critical finding is based on individualized consideration of the offender and is consistent with the statutory goals.[3]

B. *The Legislative History of the F.Y.C.A. Also Demonstrates That an Explicit Finding, Supported by Reasons, Is Required Under the Act*

The F.Y.C.A. was intended to provide a new, comprehensive sentencing and treatment system for youth of-

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[2] Congress could have said, but did not, that before sentencing a youth offender to an F.Y.C.A. facility, the judge must affirmatively find that the youth would benefit from F.Y.C.A. treatment. This is what Congress did in 18 U.S.C. § 4209, covering young adult offenders (persons 22 to 26). That provision states:

> "... *if ... the court finds that there is reasonable grounds to believe that the defendant will benefit from the treatment* provided under the Federal Youth Corrections Act ... sentence may be imposed pursuant to the provisions of such act." (emphasis supplied)

[3] Section 5010(e), which can be utilized by a judge making a § 5010(d) finding, provides:

> "If the court desires additional information as to whether a youth offender *will derive benefit* from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court *its findings.*" (emphasis supplied).

Two courts of appeals have held that the sentencing judge may place the findings of the Division on the record and incorporate them as his own, without necessarily having to state further reasons. *United States* v. *Coefield*, 476 F.2d 1152 (D.C. Cir. 1973) (*en banc*); *United States* v. *Kaylor*, No. 73-1530, (2nd Cir., February 11, 1974) (*en banc*) (slip opinion).

fenders. S.Rep. No. 1180, 81st Cong., 1st Sess. 1 (1949) (hereinafter "1949 S.Rep."). From the legislative history, certain goals and principles emerge as the salient considerations which animated Congress.

1. The Basic Goal of the F.Y.C.A. Is to Rehabilitate the Individual Youth Offender So as to Avoid His Transformation Into a Habitual Criminal

Congress was concerned that "special causations which occur in the period between adolescence and manhood are, in large measure, responsible for antisocial conduct trends manifested by persons [under 22]." H.Rep. No. 2979, 81st Cong., 2nd Sess. 2 (1950) (hereinafter "1950 H.Rep."). The group of offenders in that age group is "the focal source of crime. It is during that period that habitual criminals are spawned." 1949 S.Rep. 1. And Congress found that "most of the causes which contribute to antisocial conduct of youth offenders . . . disappear when the youth reaches full maturity." 1950 H.Rep. 3.

Congress clearly hoped to make a "substantial contribution" towards solution of the crime problem by substituting "correctional rehabilitation for retributive punishment" for youth offenders. *Id.*, at 1.[4] Accordingly, to reach the youth

[4] "The underlying theory of the act is to substitute for retributive punishment, methods of training and treatment designed to correct and prevent criminal tendencies. The plan of the act departs from the merely punitive idea of dealing with youthful offenders and looks primarily to the objective idea of rehabilitation." Report to the Judicial Conference of the Committee on Punishment for Crime, Report of the Subcommittee on Treatment of Youthful Offenders 35 (1942). The Judicial Conference, in the 1942 report, published a "Draft Act to Provide A Correctional System for Youth Offenders." The statement above refers to that Draft Act. Hearings on the Act were held in Congress during 1943. And the Draft Act was the core of the F.Y.C.A. when it was passed in 1950. 1949 S. Rep. 3-4; 1950 H. Rep. 8. See also *Hearings on S.1114 and S.2609 Before a Subcomm. of the Senate Comm. on the Judiciary*, "A Correctional System for Youth Offenders," 81st Cong., 1st Sess. 60 (1949) (hereinafter "1949 Senate Hearings").

offender "before the traits of the habitual criminal are allowed to develop," Congress created a special system of "analysis, treatment and release that will cure rather than accentuate the antisocial tendencies that have led to the commission of crime." *Id.*, at 1. This system was to meet the need created by "the existing methods of treatment of criminally inclined youths" which are "not solving the problem." *Id.* As the D.C. Circuit has stated, "the patent purpose . . . exhibited" by Congress was "to do everything possible to save youthful offenders from lives of hopeless criminality." *United States* v. *Reed & Hoston,* 476 F.2d 1145, 1149 (D.C. Cir. 1973) (*en banc*).

2. The Concept of Rehabilitative Treatment Was Broadly Conceived by Congress, and a Comprehensive System for Rehabilitation Was to Be Provided

The broad conception of treatment which Congress intended youth offenders to be given is evident on the face of the statute. Section 5006 defines "treatment" expansively as "corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders." Section 5011, the "treatment" provision, states:

> "Committed youth offenders not conditionally released shall undergo treatment in institutions of maximum security, medium security or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the *essential varieties* of treatment." (emphasis supplied).

And the emphasis on providing appropriate treatment for each individual offender is reflected in § 5014, which states:

> "The classification center or agency shall make a complete study of each committed youth offender, including a mental and physical examination, to ascertain his personal traits, his capabilities, pertinent circumstances of his school, family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to his delinquency. . . . The agency shall promptly forward to the Director . . . a report of its findings with respect to the youth offender and its recommendations as to his treatment."

The legislative history demonstrates that the F.Y.C.A. was closely patterned after the English Borstal System used to treat youth offenders. 1950 H.Rep. 3. According to the Judicial Conference report accompanying model legislation from which the F.Y.C.A. was largely derived, the Borstal System provided a "method of closely integrated, highly individualized institutional rehabilitation and aftercare of convicted" youth offenders. Report to the Judicial Conference of the Committee on Punishment for Crime, Appendix I: The Borstal System 53 (1942). As the 1950 House Report noted, "[t]hree cardinal principles dominate the [Borstal] System: (1) flexibility, (2) individualization, and (3) emphasis on the intangibles." These principles were implemented by carefully diagnosing the offending individual and by systematically providing a broad range of treatment institutions to meet the particular needs of a youth offender. 1950 H.Rep. 4.

Thus, Congress' intention to provide broad and comprehensive rehabilitative treatment through the F.Y.C.A. is unmistakable. Minimum to maximum security institutions are to be available. 18 U.S.C. § 5011. Long and short-term treatment are to be provided. 18 U.S.C. §§ 5010(b-c). The F.Y.C.A. facilities are to provide a wide range of treatment services. 18 U.S.C. § 5011; 1950 H.Rep. 5. And these facilities are to meet a broad range of individual youth offender

needs—physical, psychological, educational, vocational, and recreational—in the name of the ultimate goal, rehabilitation.[5] As Dr. William D. Lewis, then director of the American Law Institute, said in the 1943 House hearings on the legislation, "the provisions . . . [of the bill] integrate all the various steps in handling the youth offender and thus make possible real individual treatment."[6]

3. Segregation of Youth Offenders From Adult Criminals Is Also an Important Congressional Goal of the F.Y.C.A.

In creating a wholly separate sentencing and treatment system under the F.Y.C.A., Congress intended to prevent recidivism not only through special treatment of youth offenders but also through segregation of youth offenders from adult criminals. Congress found that adult prisons had direct, harmful effects on youths incarcerated there:

> "By herding youth with maturity, the novice with the sophisticate, the impressionable with the hardened,

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[5] The 1949 Senate Report, at 4, describes the Borstal System in this respect:

> "The Borstal program features . . . an individual plan based on close acquaintance with individual needs; a high degree of personal interest on the part of the staff; reliance for rehabilitation upon the analysis of the physical, physiological and social needs of persons in this age group, and allocation to the facility best suited to fill that need."

See also 1949 Senate Hearings, at 11, 24, 27, 30-31, 44, 46, 75.

[6] *Hearings Before a Subcomm. of the Comm. of the Judiciary of the United States House of Representatives on H.R. 2140, "Federal Corrections Act and Improvement in Parole,"* 78th Cong., 1st Sess. 47 (May 18-19, June 10, 1943). (Hereinafter "1943 House Hearings.") The American Law Institute, like the Judicial Conference, had drafted a model youth act based on the Borstal System. American Law Institute, Youth Correction Authority Act (1940). See 1950 H. Rep. 8. See also 1949 Senate Hearings, at 75-6 (statement of John Ellingston, American Law Institute).

> and by subjecting youth offenders to the evil influences of older criminals and their teaching of criminal techniques, without the inhibitions that come from normal contacts and counteracting prophylaxis, many of our penal institutions actively spread the infection of crime and foster, rather than check it." 1950 H.Rep. 2-3.[7]

Accordingly, the statute, in terms, provides for segregation of youths from adults, and of more hardened youths from the less criminally sophisticated: " . . . youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment." 18 U.S.C. § 5011.

4. A Strong Presumption Favors Commitment of Youth Offenders to Youth Act Facilities Rather Than Adult Institutions

The 1949 Senate Report underscores the point that there is a presumption favoring commitment under the F.Y.C.A. over adult sentencing:

> "If after the [§ 5010(e)] report is received from the classification center . . . the judge is convinced that the youth is incorrigible and would derive *no help* from the program, he may sentence him under any applicable provision of law." *Id.*, at 5 (emphasis supplied).

As Senator Kilgore, the Senate sponsor of the Act, remarked during the 1943 hearings, given "the tools to work with these youthful offenders themselves [as the F.Y.C.A. would provide], there is only about 10 percent of them that you will eventually have to sentence [as adults], *or less.*" *Hearings Before a Subcomm. of the Comm. on the Judiciary*

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[7] See also 1949 Senate Hearings, at 48, 60.

of the United States Senate on S.895, 78th Cong., 1st Sess. 13 (1943) (emphasis supplied).[8]

Another example of Congress' desire to afford F.Y.C.A. treatment to the maximum number of youth offenders is its addition of § 5010(c) to the 1943 version of the legislation. This provision extended the scope of the Act to youth offenders of even more doubtful rehabilitative possibilities; it provided that those youths who might not have qualified for treatment under § 5010(b), because of the inadequacy of the six-year limitation in that provision, could nevertheless be sentenced *under the Act* for a period up to the maximum authorized for the offense.

Finally, the presumption favoring commitment under the F.Y.C.A. over adult sentencing follows clearly from the Congressional finding that youth offenders are a special class, from the establishment of the special goals for that class of rehabilitation and segregation from adult offenders, and from the comprehensive treatment system Congress provided.[9]

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[8] Another indication that Congress intended that only a very small percentage of youth offenders would receive an adult sentence is found in the testimony of American Law Institute Director Lewis during the 1943 House Hearings. *See* note 6, *supra*, and text accompanying it. Lewis was commenting that only a small percentage of youth offenders would need maximum security facilities *under the Act itself*, and he defined those in need of such facilities as "the dangerously anti-social, those whose criminality has become a deep-seated habit." If youth offenders such as those were to receive F.Y.C.A. disposition, only the most extreme cases would not be eligible for an F.Y.C.A. commitment.

The 1950 House Report concludes, at 10:

> "The problem of that unfortunate part of our young men who fall into anti-social tendencies presents an inspiring challenge and it can be solved. Instead of 70 percent of our youth offenders developing into hardened criminals, more than 70 percent can be rehabilitated and made useful members of society."

[9] This comprehensiveness was described most succinctly by Circuit Judge Orie L. Phillips:

(footnote continued on next page)

5. The Presumption in Favor of Committing a Youth Offender to a Youth Act Facility Can Only Be Rebutted by a Finding That He is Incorrigible

To find that a youth offender is ineligible for commitment to an F.Y.C.A. facility—to satisfy the "no benefit" requirement of § 5010(d)—a showing must be made that the individual is incorrigible. This follows from the primary Congressional goal of treatment of youth offenders before they develop the traits of the habitual criminal. If a person has already developed the traits of the habitual criminal—is an incorrigible recidivist—special youth treatment and special segregation from adult criminals will be of no avail. As Harrison Tweed, President of the American Law Institute, stated:

> "... if the criminal law is to do a more effective job of protection, it must seek to rehabilitate all those who can be rehabilitated and segregate indefinitely those who remain incorrigibly dangerous. This new purpose, I believe, will be accomplished through the instrumentality of the proposed legislation." 1949 Senate Hearings, at 37; see also *id.*, at 40 (statement of Sen. Kilgore).

"The most important features of the ... [Act] are integration of correctional measures under a single body, segregation of youth offenders from adult offenders and segregation of classes of youth offenders, power to develop a variety of treatment facilities, flexibility of operations in adapting particular forms of treatment to individual youths in accordance with their favorable or unfavorable responses, adequate supervision during conditional release and focusing of effort on the important youth crime problem." 1943 House Hearings, at 33.

Judge Phillips was Chairman of the Subcommittee on Treatment of Youth Offenders of the Judicial Conference's Committee on the Punishment of Crime. He was thus instrumental in drafting the model act upon which the F.Y.C.A. was based.

See also United States v. *Coefield, supra,* 476 F.2d at 1156 ("No federal statute having to do with sentencing compares in comprehensiveness with the Youth Corrections Act.").

This view was echoed in the 1949 Senate Report, at 5, which concluded that a judge should sentence a youth as an adult only when he is convinced that the youth is "incorrigible" and would "derive no help" from commitment to F.Y.C.A. facilities. Similarly, the 1950 House Report implies that the Act is not for the "mature," "sophisticated" and "hardened" criminal. 1950 H.Rep. 2-3. But only a few youth offenders would be so incorrigible as to warrant denial of commitment to an F.Y.C.A. facility.[10]

Thus given Congress' deep-felt concern, which the legislative history strikingly illustrates, about the need to devise a unique sentencing and correctional system for a special class of offenders, sound construction of the F.Y.C.A. requires that before a judge sentences a youth offender as an adult he should make explicit the required § 5010(d) "no benefit" finding. He should also give supporting reasons to ensure that his decision comports with the special goals manifested by the legislation.

C. *There Is No Legislative History Indicating That the § 5010(d) Finding May Be Implicit and Without Supporting Reasons*

In its memorandum in response to the petition for *certiorari*, respondent did not analyze the language of § 5010(d) or discuss the goals of the F.Y.C.A. These primary tools of statutory construction do not support respondent's position that § 5010(d) is satisfied by an implicit finding that a youth offender will not derive benefit from commitment to an F.Y.C.A. facility, before he is sentenced as an adult. In-

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[10] As Circuit Judge John Parker said during the 1949 Senate Hearings, at 48:

"... when you are dealing with youth offenders ... the chief purpose of punishment, excepting in the *very exceptional cases*, the chief purpose should be to reform the offender." (emphasis supplied).

stead, respondent asserts that two small parts of the legislative history support its position. Memorandum for the United States, filed November 19, 1973, at 5-7 (hereinafter "Memorandum"). But one argument from the history is clearly erroneous, and the second is not on point.

First, respondent, in footnote 5 of its Memorandum, implies that the original version of the F.Y.C.A., submitted to Congress in 1943, H.R. 2140, 78th Cong. 1st Sess. (1943), explicitly required a statement of reasons from a sentencing judge, before he sentenced a youth offender as an adult, but that this requirement was deleted in later versions of the legislation. But the statutory language to which respondent refers in the footnote had *no* applicability to the decision to sentence youth offenders as adults rather than under the special youth act. It applied instead to the sentencing of adult offenders.[11] Respondent apparently does not realize that the original bill dealt with the sentencing of youth and adult offenders in separate sections. The *adult* provisions were dropped in later versions. Accordingly, this argument advanced by the respondent is clearly erroneous.

Second, respondent quotes statements from the 1949 Senate Hearings by various members of the judiciary who were proponents of the legislation and by Senator Kilgore, the bill's sponsor. See Memorandum, at 5-6. For example, Judge Parker is quoted as saying: the bill "does not inter-

[11] The language quoted in footnote 5 of respondent's Memorandum comes from Title II, § 1, of the draft bill. This section clearly refers to "offenders." "Offender" is defined in Title I, § 2(g), as "a convicted person *other than a youth offender.*" (emphasis supplied). Thus, the original bill's requirement that, with respect to "offenders," the judge must "state his reasons, which shall be reduced to writing" had no applicability to the sentencing of "youth offenders." And its subsequent deletion has no relevance to the issue before this Court.

fere with the power of the judge . . . with respect to . . . [youth] offenders, but gives him merely an alternative method of treatment of these people." This and the other statements quoted by respondent, however, only support a position that both parties and *amici* adhere to, *viz.*, the F.Y.C.A. does not *require* the sentencing judge to commit a youth offender to F.Y.C.A. facilities. The question before this Court is not whether the sentencing judge has the discretionary power to sentence a youth offender as an adult —obviously he does—but rather how that discretion is to be exercised consistent with the goals of the legislation. *Amici* respectfully submit that the only sound reading of § 5010(d) in the context of the F.Y.C.A.'s legislative history is that it requires an explicit finding, supported by reasons, before a youth offender may be denied treatment in one of the special youth facilities established by Congress.

II.

Circuit Courts Which Have Considered the Issue *En Banc* Have Decided That the Language and Legislative History of the Act Require That an Explicit Finding Supported by Reasons Be Made by the Sentencing Judge.

The Second Circuit and the D.C. Circuit are the only two United States Courts of Appeals which have addressed themselves *en banc* to the question herein presented by exploring at length the purpose and Congressional history of the Act. Both courts agreed, with only a single dissenter among 19 circuit judges,[12] that the Act requires an explicit "no benefit" finding supported by reasons. *United States* v. *Kaylor,* No. 73-1530 (2nd Cir., February 11, 1974) (*en*

[12] Judge MacKinnon dissented from *United States* v. *Coefield, supra,* 476 F.2d at 1161 (D.C. Cir. 1973).

banc); *United States* v. *Coefield*, 476 F.2d 1152 (D.C. Cir. 1973) (*en banc*).

The Second Circuit held:

> "We are unanimously of the view, then, that the language of the Act, its intent and purpose, coupled with the practical consequences of any decision otherwise, require a construction that a finding of no benefit under § 5010(d), whether requested or not, be made explicit in the record, preferably at the time of imposing sentence."
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> "The question whether the trial court must state reasons in connection with its findings of no benefit, while arguably somewhat more difficult, is nevertheless answered largely by the legislative history and on essentially the same basis that the explicit-implicit question was resolved . . . [that] a statement of reasons by the sentencing judge is 'essential to a knowledgeable administration of the Act as intended by Congress.'" *United States* v. *Kaylor, supra*, Slip Op., pp. 8, 12.

Both the *Kaylor* and the *Coefield* courts relied on the legislative history we have set out in Section I to document the Congressional intent to establish a separate diagnostic and treatment system, which would presumptively apply to youthful offenders in order to protect them from contamination by older offenders and divert them from long-term criminal careers.

The reasoning of both the *Kaylor* and *Coefield* decisions was that, since the Act requires the court to make a finding of "no benefit" before imposing an adult sentence, implying that finding from the mere fact of an adult sentence would render the requirement of § 5010(d) nugatory. *United States* v. *Kaylor, supra*, Slip. Op., p. 8. At the same time, requiring a search through the record for an implicit finding would involve an appellate court in a maze because

"there will be the greatest room for differences of opinion as to whether such a finding is to be implied." *Id.* If trial courts are conscientiously to follow the Act,[13] the "no benefit" finding must be explicitly stated. See *United States* v. *Kaylor, supra,* Slip Op., p. 10 n. 9; *United States* v. *Coefield, supra,* 476 F.2d at 1156.

Furthermore, both the *Kaylor* and *Coefield* courts agreed that the judge under § 5010(d) must indicate his reasons for a finding of "no benefit":

> ". . . to assure in every case: firstly, that the District Judge manifest not only an awareness that the Act is applicable to the case, but also an accurate understanding of the scope of his discretion under the Act; secondly, that the District Judge has been informed of the pertinent facts relating to the individual defendant before him, either by evidence coming to his attention in the trial, by a presentence report, or by a recommendation and report made under section 5010(e); and thirdly, that the District Judge, by his statement of reasons where required, has given consideration and related the facts of the individual case to the applicable law. If these requirements are satisfied, there should be no large numbers of appeals calling for review of sentences which call for consideration of the Youth Corrections Act." *United States* v. *Coefield, supra,* 476 F.2d at 1157-1158.

As the *Kaylor* court concluded:

> "In sentencing under the Youth Corrections Act, . . . a court necessarily must face up to the proposition . . . that Congress has indicated a clear preference for the objective of rehabilitation both in the legislative history of the Act and in the statutory language that is

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[13] See *United States* v. *Kaylor, supra,* Slip Op., p. 11:

". . . a statement of reasons has direct beneficial effects at the district court level in terms of—in and of itself—contributing to rational decision making and focusing consideration on the question of benefit of treatment under the Act."

> utilized. Indeed, sentencing under § 5010(d) is conditioned on a prerequisite finding of fact and absent such a finding—that of 'no benefit'—sentencing thereunder is improper. There is no rational way in which we can determine whether such a finding is adequately supported in the absence of a statement of reasons underlying it as an ultimate finding. Slip Op., pp. 11-12.[14]

A requirement of an explicit finding of "no benefit" supported by reasons does not, as respondent suggests in its Memorandum, p. 5, create "an exception to the rule that, unless a constitutional limitation is violated, sentencing is a matter wholly within the trial judge's discretion and does not require the entry of articulated and reviewable reasons supporting the punishment imposed". It merely permits a traditional kind of review for legal error or failure to consider legally mandated criteria.[15] As the *Kaylor* court said:

> "[We] do not hereby propose even in this field unlimited appellate review. Rather as the District of Columbia Circuit also held in a companion case to *Coefield, United States* v. *Reed,* 476 F.2d 1145, 1150 (D.C. Cir. 1973), 'An appellate court can only be concerned with the rationality of [the] factors [which informed and shaped the particular exercise of the trial court's discretion], in relation to the congressional objectives.' We take the view, as did the *Reed* court, that 'where the rationality is present and visible' the appellate court function is at an end." Slip Op., p. 13.

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[14] Both the *Kaylor* and *Coefield* decisions allow a District Judge to adopt relevant and valid reasons supporting a finding of "no benefit" set out in a diagnostic report prepared under § 5010(e). *United States* v. *Coefield, supra,* 476 F.2d at 1157; *Kaylor* v. *United States, supra,* Slip Op., p. 11.

[15] See *e.g., United States* v. *Carter,* 225 F. Supp. 556 (D.D.C. 1964); *Rogers* v. *United States,* 326 F.2d 56 (10th Cir. 1963); *DeWitt* v. *United States,* 383 F.2d 542 (5th Cir. 1967).

Indeed, an explicit finding of "no benefit" supported by reasons will limit, not expand, appellate review of F.Y.C.A. sentences. If an appellate court must hunt and peck through an entire record to ascertain whether the judge made an "implicit" finding of "no benefit," and why, its review will be both more comprehensive, speculative, and time-consuming than that contemplated in *Kaylor* and *Coefield*. Experience in other circuits with the implicit finding rule has resulted in numerous remands, leading Circuit Courts (besides the Second Circuit and the D.C. Circuit) to require explicit findings, often with reasons, on remand as part of their supervisory jurisdiction. See *Cox* v. *United States*, 473 F.2d 334, 337 (4th Cir. 1973) (*en banc*) (remand for explicit findings and reasons); *United States* v. *Jarratt*, 471 F.2d 226, 230 (9th Cir. 1972) (express finding of "no benefit" to be made on resentencing); *United States* v. *Schenker*, 486 F.2d 318 (5th Cir. 1973) (remanded for "appropriate findings" under 18 U.S.C. § 5010(d)); *Williams* v. *United States*, 476 F.2d 970, 972 (3d Cir. 1973) (findings prescribed in 18 U.S.C. § 5010(b)-(d) must hereafter be made in open court on the record because of "the increasing number of federal cases raising problems similar to that involved in this appeal"); *United States* v. *MacDonald*, 455 F.2d 1259 (1st Cir. 1972), *cert. den.*, 406 U.S. 962 (remand to make findings required by the F.Y.C.A.). In all, seven out of ten Circuits have found it necessary to lay down requirements for an explicit finding, either as a general rule or in specific cases.

In fact, no court which has directly addressed the issue, except perhaps the Seventh Circuit in this case,[16] has ever

[16] *United States* v. *Bamberger*, 456 F.2d 1119, 1128 n. 7 (3rd Cir. 1972), and *United States* v. *Walker*, 469 F.2d 1377, 1381 n. 4 (1st Cir. 1972), summarily dismissed, each in a footnote, without any consideration of legislative history or existing case law, arguments that an adult sentence was illegal without an explicit "no benefit"

questioned that a district judge must make a specific finding, implicit or explicit, of "no benefit" under § 5010(d) and that his finding must be based on relevant facts in the record which fall within the legal scope of his discretion under the statute. See, *e.g.*, *Cox* v. *United States, supra,* 473 F.2d at 337; *Williams* v. *United States, supra,* 476 F.2d at 971; *United States* v. *Jarratt, supra,* 471 F.2d at 230.

Thus, it is not the D.C. Circuit, but the Seventh Circuit which is out of step and in conflict with the other circuits, insofar as it appears to negate the requirement of any such finding. Without express findings supported by reasons, there can be no assurance that the F.Y.C.A. is being followed and a §5010(d) finding is being made on the basis of the law and the record.[17] There cannot be uniform application of the Act in any circuit, proper supervisory guidelines for its application, or monitoring of its administration, unless the district judge is required to make an explicit "no benefit" finding supported by reasons.

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finding. In *Bamberger* an "implicit" basis for the adult sentence was found in the aggravated circumstances of the crime; in *Walker* it was inferred on the lack of any "antisocial" tendencies in the draft-resisting defendant. In the Third Circuit, a later *en banc* case required explicit "no benefit" findings in all future cases. See *Williams* v. *United States, supra.* In the First Circuit, other cases have been remanded for explicit "no benefit" findings. See *United States* v. *MacDonald, supra.* The persuasiveness or authority of either the *Bamberger* or *Walker* case is extremely dubious.

[17] See, *e.g.*, *United States* v. *Wilson,* 450 F.2d 495 (4th Cir. 1971) (judge either did not remember Act or misunderstood its applicability); *Williams* v. *United States, supra,* (judge said he considered Act but appellate court required express findings in future); *United States* v. *Jarratt, supra,* (court said nothing about § 5010(d), intention must be clarified on remand); *United States* v. *Schenker, supra,* (appellate court remanded to settle dispute whether implicit finding had been made); *United States* v. *Coefield, supra,* (ambiguity in record made implicit findings impossible); *United States* v. *Kaylor, supra,* (judge's assertion he "always takes" F.Y.C.A. "into consideration" not sufficient); *United States* v. *MacDonald, supra,* (judge mistaken about applicability of F.Y.C.A. to narcotics cases.)

III.

This Case Does Not Present a Proper Occasion for Resolving Broader Issues Under the F.Y.C.A.

It is important to recognize that the issue which respondent urged this Court to resolve in this case—an asserted conflict between the D.C. Circuit and other Circuits "regarding the need to supply *detailed, reviewable reasons* in support of the conclusion that sentencing under Section 5010(d) is appropriate" [18]—is not properly presented here. Respondent concedes that:

> "To the extent that the court of appeals (*sic*) disagree about the need for the district court to make explicit its conclusion that a particular defendant will not benefit from treatment as a youth offender under Sections 5010(b) or (c), the conflict is one of limited substantive importance that need not be resolved by this Court." (Memorandum, pp. 11-12)

Respondent further concedes:

> "[I]f some of the circuits in order to assure that the district court has in fact considered the possibility of youth offender sentencing, desire an explicit statement on the record to that effect, we believe that is the kind of supervisory, 'housekeeping' matter that does not require uniform national treatment." (*Id.*, p. 12 n.9)

No wider conflict is before this Court for decision. The Seventh Circuit did not deal with whether "detailed, reviewable" reasons for an adult sentence are required, since it did not even require the explicit statutory finding of "no benefit". As we have shown, the Seventh Circuit erred, and an explicit statutory finding of "no benefit" supported by

[18] Memorandum, p. 12.

reasons is required. But the degree to which the finding must be supported by "detailed" reasons, the extent to which those reasons are reviewable on appeal, and the standard of any review are all questions which can and should be left to decision for another day.[19]

It would be unwise for this Court to decide any of the broader questions tendered to it by respondent. This is so for reasons over and above the familiar principle which counsels against decision of issues not before the Court.

First, it would be incongruous for this Court to decide broader issues under the F.Y.C.A., many of which have arisen in the District of Columbia, without a case from the D.C. Circuit before it. As the Second Circuit observed in *United States* v. *Kaylor, supra,* the Seventh Circuit gave only summary treatment to the F.Y.C.A. question in the present case. Slip Op., p. 3 n. 3. It evinced lack of familiarity with the legislative history and even with the decisions of other Circuits construing the Act. *Id.* The D.C. Circuit, on the other hand, has dealt in depth with F.Y.C.A. problems for years and has acquired extensive knowledge of the background and the operations of the Act.[20]

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[19] Other questions which have arisen in the District of Columbia and were detailed in respondent's Memorandum (pp. 10-11) are likewise not before this Court. There is no issue here whether, if a finding of "no benefit" is required, adoption by a district court of the recommendations of a report under § 5010(e) will satisfy the requirement; or whether the recommendations of a § 5010(e) report, if relied on by a district court to make a "no benefit" finding are subject to judicial review; or whether reasons must be stated when a judge sentences a youth under § 5010(c) rather than § 5010(b).

[20] Moreover, the District of Columbia Court of Appeals, which is now the highest court of the District of Columbia under the D.C. Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473, has adopted the views of the D.C. Circuit as set forth in *United States* v. *Coefield, supra.* See *Small* v. *United States,* 304 A.2d 641 (1973).

Second, the District of Columbia is a unique jurisdiction from the standpoint of the F.Y.C.A. A substantial body of case law has been carefully built up in the District of Columbia to take account of the special problems and needs of the District. The evolution of standards under the F.Y.C.A. should not be brought to a halt by this Court, as respondent would have it do.

As originally enacted in 1950, the F.Y.C.A. did not apply to the District of Columbia. (64 Stat. 1085). In 1952 Congress extended its coverage to the District of Columbia and deliberately included not only youths convicted of U.S. Code violations but also of common law crimes under the D.C. Code. (§§ 5024, 5025, 66 Stat. 45-46). Only in the District of Columbia is the F.Y.C.A. applicable to both classes of offenders; elsewhere in the country it applies only to those convicted of U.S. Code offenses. An experienced District Judge in the District of Columbia has written:

> "There are many offenders below the age of 22 who come before this Court who can be and have been rehabilitated through the Youth Corrections Act program. Congress has wisely put such a program into effect and experience has emphasized and reemphasized the validity of this approach to many young offenders in a community such as Washington, D.C." *United States* v. *Alsbrook,* 336 F. Supp. 973, 980 (D.D.C. 1971)

The District of Columbia also has a far greater number of F.Y.C.A. cases than any other federal jurisdiction. F.Y.C.A. sentencing determinations are made in both the United States District Court and the Superior Court of the District of Columbia.[21] The District of Columbia now oper-

[21] F.Y.C.A. sentencing determinations in the District must be made in a large number of misdemeanor cases under the D.C. Code, as well as U.S. and D.C. Code felonies. *Harvin* v. *United States,* 445 F.2d 675 (D.C. Cir. 1971).

ates two Youth Centers at Lorton, Virginia, with facilities for over 600 inmates; establishment of a second Youth Center was ordered by the District Court in 1971 pursuant to its supervisory authority over the administration of criminal justice in the District. See *United States* v. *Alsbrook, supra,* 336 F. Supp. at 980-81. According to figures compiled by the District of Columbia Department of Corrections, there were 724 F.Y.C.A. commitments to the District of Columbia Youth Center in fiscal 1972. District of Columbia Department of Corrections, Summary Report 1967-1972, p. 51; and see *United States* v. *Riley,* 481 F.2d 1127, 1139 n.11 (D.C.Cir. 1973) (dissenting opinion of MacKinnon, J.) By contrast, in the same year, 1155 youths were committed under the F.Y.C.A. from all federal district courts into all youth centers operated by the Federal Bureau of Prisons. Federal Bureau of Prisons Statistical Report, Fiscal Years 1971 and 1972, p. 60.

It is against this background of high volume urban crime, which has severely taxed the courts and correctional facilities of the District of Columbia, that the D.C. Circuit and other courts in the District have attempted to regularize sentencing procedures under the F.Y.C.A. Contrary to respondent's view, the D.C. Circuit has not straitjacketed District Judges in sentencing under the F.Y.C.A. or sanctioned intermeddling by appellate courts in the sentencing process. In its leading *en banc* decision, the D.C. Circuit specifically held:

> "In providing for reasons to be stated by the District Court we are not seeking to elicit any litany or prescribed formula. . . . If these requirements [of giving reasons] are satisfied, there should be no large number of appeals calling for review of sentences which call for consideration of the Youth Corrections Act." *United States* v. *Coefield, supra,* 476 F.2d at 1157-58.

As the D. C. Circuit further stated in its companion *en banc* opinion in *United States* v. *Reed & Hoston, supra,* 476 F.2d at 1150:

> "The awesome and difficult task of sentencing continues to be vested in the one man who is best circumstanced to discharge it wisely, that is to say, the trial judge. The Youth Corrections Act does not change that, nor does it contemplate wholesale appellate intrusion into that process."

A requirement of a "no benefit" finding supported by reasons will help to bring order and rationality into the difficult function of sentencing under the F.Y.C.A. Judge Wilkey put the point well in *United States* v. *Waters, supra,* 437 F.2d at 723:

> "What happens to an offender after conviction is the least understood, the most fraught with irrational discrepancies, and the most in need of improvement of any phase in our criminal justice system."

CONCLUSION

The guiding statutory goals and principles which emerge from an analysis of the legislative history indicate profound Congressional concern about a special class of offenders: a concern which led, as has been noted, to the formulation of special goals for sentencing youth offenders, creation of a comprehensive treatment system to meet a variety of rehabilitative needs, and establishment of a presumption in favor of commitment to an F.Y.C.A. facility rather than incarceration in an adult correctional institution.

Only through a requirement of an explicit "no benefit" finding, supported by reasons, can the important Congressional objectives manifested by the statute be properly implemented.

For these reasons and those set forth in petitioner's Brief, the judgment of the court below should be reversed and the case remanded for reconsideration of sentencing under the F.Y.C.A.

Respectfully submitted,

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